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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-11

SHELL OIL COMPANY, *Appellant*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-12

CONTINENTAL OIL COMPANY, ET AL., *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-47

GULF OIL CORPORATION, *Appellant*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*,

No. 77-64

ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION, *Appellants*,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

(Continued on inside cover)

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MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

I.

A.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE.

This is a direct appeal from the judgment of the Court of Appeals of Maryland upholding the validity of Chapter 854 of the Laws of Maryland of 1974, as amended by, Chapter 608 of the Laws of Maryland of 1975 (codified at Maryland Annotated Code Article 56, Sections 157E(b) through (h) (1972 Repl. Vol., 1976 Cum. Supp.)) under the Constitution and laws of the United States.

The Act provides:

> (B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company

> personnel, a subsidiary company, commissioned agent, *or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.*
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
>
> (E) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.
>
> (F) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.
>
> (G) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.
>
> (H) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.
>
> (The italicized portions are those added by Chapter 608 of the Laws of Maryland of 1975.)

Appellants argue (1) that the statute deprives them of their property without due process of law, (2) that the Act, *in toto*, violates Article I, Section 8 of the United States Constitution, and (3) that Paragraph (D), providing for uniform price assistance programs through "voluntary allowances" conflicts with provisions of the Robinson-Patman Act, 15 U.S.C. § 13, and,

therefore, is invalid under the Supremacy Clause of Article VI of the United States Constitution. Appellees submit that the law was enacted pursuant to the State's proper exercise of its long recognized power to regulate its internal commercial and business affairs and that this appeal does not present a substantial federal question for this Court's consideration.

B.

THE PROCEEDINGS BELOW.

This litigation was commenced when Exxon Corporation, prior to the effective date of the statute, instituted suit on June 17, 1974, in the Circuit Court for Anne Arundel County, Maryland, seeking declaratory and injunctive relief from alleged constitutional and statutory infirmities in the law. Over the next nine months eight additional parties filed a total of six suits challenging the Act on state and federal constitutional grounds. All cases were consolidated for purposes of trial.

At trial and on appeal appellants raised the host of constitutional and statutory objections to the statute now presented to this Court. The Circuit Court for Anne Arundel County, on October 14, 1975, granted appellants' Motion For Partial Summary Judgment as to Paragraph (D) of the Act holding that provision to be in conflict with and preempted by provisions of the Robinson-Patman Act. (App. C, 49a-51a).[1] On January 27, 1976, the Circuit Court for Anne Arundel County entered a final judgment and decree declaring the statute violative of the due process and equal protection clauses of the federal Constitution and invalid as a taking of appellants' property without just compensation. (App. D, 53a-134a). The challenge to the Act under

[1] The references to Appendicies A-D, as used herein, are to the Joint Appendix To Jurisdictional Statements filed by appellants.

the Commerce Clause was rejected by the trial court. (App. D, 123a). Upon appeal to the Maryland Court of Appeals, the decision of the trial court was unanimously reversed and the statute was upheld against all constitutional challenge. (App. A, 1a-44a).[2]

II.

ARGUMENT

THE CASE PRESENTS NO FEDERAL QUESTIONS NOT PREVIOUSLY DECIDED BY THIS COURT OR IMPORTANT ENOUGH TO WARRANT PLENARY TREATMENT.

A.

APPELLANTS' CONTENTION THAT THE ACT CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Of the seven oil companies appealing the judgment of the Maryland Court of Appeals only Continental Oil Company and its wholly owned subsidiary Kayo Oil Company question the validity of the Act upon substantive due process grounds. (Continental and Kayo Jurisdictional Statement, No. 77-12, at 13-18). These appellants acknowledge this Court's unbroken line of authority upholding the power of state legislatures to respond to practices which they deem "injurious . . . in their internal commercial and business affairs," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v.*

[2] The opinion of the Court of Appeals of Maryland containing the judgment of that court reversing the judgments of the Circuit Court for Anne Arundel County is officially reported at 279 Md. 410 (advance reports) and unofficially at 370 A.2d 1102 (advance reports). A supplemental opinion of the Court of Appeals on motions for reconsideration and stay of mandate is officially reported at 279 Md. 456 (advance reports) and unofficially at 372 A.2d 237 (advance reports).

Security Life Insurance Co., 336 U.S. 220 (1949); *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934) and concede that this Court has made clear that it will not substitute its "social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Nevertheless Continental and Kayo here renew the argument, unsuccessfully presented to the Maryland General Assembly, that Paragraph (C) of the Act will not "preserve or enhance competition," in the retail sale of gasoline.

Appellants were afforded extraordinary access to the legislative process prior to the enactment of the law. (App. A, 7a-10a; E. 65-68).[3] In response to the gasoline crisis of 1973 the Comptroller of the State Treasury directed questionnaires designed to elicit a broad spectrum of information relevant to the operation of the retail gasoline market to Maryland's 4,055 registered service station dealers and to the twenty major oil companies operating within the state, including Continental and Kayo. (App. A, 7a-8a; E. 65-66). As a result of the information obtained identical bills were introduced into both Houses of the Maryland General Assembly prohibiting producers and refiners of petroleum products from directly operating retail service stations. Public hearings were held on the bills by Senate and House Committees of the State legislature; at both hearings the major oil companies were fully represented (E. 67) and expressed their view that the direct operation of retail service stations provided them with the most efficient and least costly method of satisfying consumer demand (E. 692, 703). Following these hearings both bills were passed by the General

[3] "E" references as used herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

Assembly. Subsequently opponents of the bills, including five major oil companies, again presented their views at a special veto hearing held by the Governor (E. 67). Unsatisfied with the outcome of the legislative process, Continental and Kayo ask this Court to subject the Maryland gasoline market to a "close scrutiny" and supplant the judgment of the General Assembly with their view of the public welfare.

Appellants' attack upon the statute is at odds with the proper standard of review of state economic regulation under the 14th Amendment.[4] State legislatures "may within extremely broad limits control practices in the business — labor field," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). This Court has made clear that "courts are both incompetent and unauthorized" to pass upon the wisdom of a particular economic policy or "the adequacy and practicability of the law enacted to forward it." *Nebbia v. New York, supra* at 537. The legislature was presented with evidence that refiners and producers of gasoline were "favoring company operated stations in the allocation of gasoline," and that as a result "some service station dealers were forced to close." (App. A, 14a). Proponents of the Act testified before the General Assembly that major oil companies were in the process of assuming total control over the gasoline market through the use of company owned stations (E. 721), and evidence was presented at trial that many dealer operated stations were being converted to company operation. (App. A, 14a). Expert testimony was adduced to the effect that the Act would "increase the competi-

[4] Appellants' citation of Roe v. Wade, 410 U.S. 113, 152-56 (1973) and Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) is inapposite to this appeal. Kayo's asserted right to "do business by direct retail sales" does not implicate the fundamental rights of privacy and association underlying the Court's heightened review in those cases. *See, e.g., Roe* at 156.

tiveness of the gasoline market" and therefore "increase the benefits that accrue to the driving public that come from the increase in competitive activity." (E. 551). "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." *Ligget Co. v. Baldridge,* 278 U.S. 105, 114-15 (Holmes, J. dissenting); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra,* at 167. It is submitted that the Act, taken as a whole, is a rational response to the direct operation of retail service stations by vertically integrated producers and refiners of gasoline.[5]

Moreover, Paragraph (C) of the Act bears a "rational relation" to that constitutionally permissible objective. Expert testimony adduced at trial concluded that the Act would aid competition by denying producers and refiners the power to focus windfall profits from crude prices upon their competitors and by increasing the amount of gasoline available to independent non-

[5] It is apparent that the legislature intended to completely prohibit the direct operation of retail service stations by producers and refiners of gasoline. By Paragraph (B) it mandated that as of the effective date of the Act no new direct operations could be opened; by Paragraph (C) it allowed affected companies one year to restructure their operations before they fell within the strictures of the law. Appellants' attempt to divorce Paragraph (C) from the Act conflicts with the approach taken by this Court in reviewing such economic legislation under the Due Process Clause. *Compare,* North Dakota State Board of Pharmacy v. Snyder's Drug Stores; Ferguson v. Skrupa, *supra.* The legislature could reasonably conclude that the danger to competition inherent in the operation of retail stations by vertically integrated companies was sufficient to prohibit such operations. That judgment is not undermined by the "phase-out" period embodied in Paragraph (C), or by the requirement of Paragraph (F) that producers and refiners of gasoline fairly allocate fuel among independent dealers after ceasing operation of their company stations.

integrated companies who provide "the only source of aggressive price competition in the retail gasoline market." (E. 551-52, 555, 579). The prohibitions of Paragraph (C) fulfill both objectives. The legislature could rationally conclude that the concentration of such economic power inherent in the direct operation of the existing 209 retail service stations by producers and refiners of gasoline within this state would not be in the best interest of the welfare of its citizens. Insisting that there is "no danger to competition" by virtue of such operations, Continental and Kayo do no more than question the wisdom of the Act and ask this Court to vitiate that legislative judgment by engaging in a balancing process which it has rejected on numerous occasions. *See, e.g., Ferguson v. Skrupa, supra* at 731; *Williamson v. Lee Optical Co., supra* at 487.

Appellants' contention that Paragraph (C) constitutes a "radical departure from traditional governmental economic regulation," flies in the face of the authority cited in their brief. Appellants admit that business conduct "deemed inimical to the public welfare, although not violative of the antitrust laws" is a proper subject for state regulation. (Continental and Kayo Jurisdictional Statement No. 77-12 at 11 n.14).[6] The strictures of the Fourteenth Amendment are not heightened in cases where there is "no suggestion of any monopoly or monopolistic practice." *Nebbia v. New York, supra* at 531-32. There is no "closed class or category of businesses affected with a public interest." *Id.* at 536. Appellants' assertion that the Maryland Court's decision is the "first decision of the highest court of any state holding that such legislation is not

[6] Appellants concede that such activities may be "remedied by divestiture." However, Continental and Kayo are not being required to divest existing company-owned stations. The Act only prohibits such vertically integrated companies from operating retail stations with company employees.

violative of the federal constitution," is patent error.[7] The propriety of the Act is attested to by similar proposals enacted by or introduced in fourteen state legislatures,[8] Congressional divestiture proposals and opinions of this Court. *See, e.g.*, H.R. Rep. No. 1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 1005, 94th Cong., 2d Sess., (1976); *FTC v. Sun Oil Company*, 371 U.S. 505, 528 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 328-34 (1962). It is submitted that Paragraph (C), and the Act *in toto*, bear a relation to the "evil" found by the General Assembly to inhere in the operation of retail service stations by vertically integrated oil companies. This Court has made clear that "state legislatures have constitutional authority to experiment with new techniques," and are entitled "to their own standard of the public welfare." *Day-Brite Lighting, Inc. v. Missouri, supra* at 423. It is submitted that the Act is not "palpably in excess" of the legislature's power and that the judgment of the Maryland Court of Appeals upholding the General Assembly's attempt to protect the public welfare in response to recent developments in the gasoline market does not present a substantial federal question for this Court's consideration. *West Coast Hotel Co. v. Parrish, supra* at 398.

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[7] Appellants' own citations state that the Florida and New Hampshire courts invalidated the statutes on *state* constitutional grounds. The New Hampshire court concluded that its statute constituted an unlawful taking of property in violation of the New Hampshire Constitution. "In all other respects the court was of the opinion that the proposed statute was constitutional." (Continental and Kayo Jurisdictional Statement, No. 77-12, at 11 n.14). The court, relying upon Williamson v. Lee Optical Co., *supra*, held the act immune from federal due process attack.

[8] *See*, Continental and Kayo Jurisdictional Statement, No. 77-12, at 10, and n.13.

B.

APPELLANTS' CONTENTION THAT PARAGRAPHS (B) AND (C) OF THE MARYLAND ACT ARE INVALID UNDER THE COMMERCE CLAUSE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellants' attempt to employ the Commerce Clause as a sword is entirely inappropriate and their reliance on that clause misplaced. As the Maryland Court of Appeals observed, the law in question is directed at "a wholly intrastate activity." (App. A, 18a). The Act has absolutely nothing whatever to do with the interstate transportation, sale or movement of gasoline. Rather, it prohibits gasoline stations in Maryland from being operated by vertically integrated oil companies. Thus, by the time that the gasoline in question can in any way be said to come in contact with the Act, it has already completed its interstate travel and finally come to rest in Maryland awaiting final sale. Because this gasoline has already been earmarked for Maryland by the appellants, these final retail sales are *per force* of an intrastate nature and not an intermediate or preliminary transfer in a stream of commerce that is to be continued. The last step in the gasoline's movement in that stream is its delivery to retail dealers. In this respect the case is distinguishable from *Stafford v. Wallace*, 258 U.S. 495 (1922), where intrastate activity was found to be subject to regulation by Congress under the commerce power because that activity was "but a throat" through which interstate commerce flowed. Here, the interstate shipment of gasoline and the preliminary preparation incident thereto, have already come to a complete end *before* the Maryland statute comes into play.

This case does not fit into any of the categories of Commerce Clause cases which the appellants cite. The Act applies evenhandedly to all and does not discriminate against commerce in any fashion. Interstate

commerce is not taxed, in a discriminatory manner or otherwise;[9] neither incoming[10] nor outgoing[11] interstate commerce is at all regulated; the Act does not represent an impermissible attempt to retain resources within the state by creating a barrier to interstate commerce;[12] the transportation of gasoline in interstate commerce is in no way impeded;[13] and, the Act does not impinge upon the privileges or immunities of any citizen.[14]

The operation of the Act does not impair interstate commerce. Only the final retail sale, a wholly intrastate activity, is at all affected and, even then, not in any way having cognizable ramifications on interstate commerce. In *Breard v. City of Alexandria,* 341 U.S. 622 (1951), and *Plumley v. Massachusetts,* 155 U.S. 461 (1894), this Court sustained local and state legislation where the unsuccessful appellants argued that the legislation involved, which touched upon the final retail sale of articles that at one time had been in interstate

[9] Boston Stock Exch. v. State Tax Comm'n, 97 S. Ct. 599 (1977); Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940).

[10] Hunt v. Washington State Apple Advertising Comm'n, 97 S. Ct. 2434 (1977); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511 (1935); Minnesota v. Barber, 136 U.S. 313 (1890).

[11] H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949). Cases sustaining a state statute concerning outgoing commerce include Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950), and Parker v. Brown, 317 U.S. 341 (1943).

[12] Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Johnson v. Haydel, 278 U.S. 16 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[13] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[14] Toomer v. Witsell, 334 U.S. 385 (1948).

commerce, was repugnant to the Commerce Clause. In the instant case no tax, prohibition, nor any impediment to the free flow of interstate commerce is created by Maryland's statute. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The Maryland law clearly meets this standard.

What we have, then, is not really a Commerce Clause case, but rather a statute the validity of which must be measured in relation to the state's police power. The overlap between Commerce Clause and police power considerations is often substantial, but the two concepts should not be confused. This was recognized by Mr. Justice Stone, dissenting in *Di Santo v. Pennsylvania,* 273 U.S. 34, 43-45 (1927), in an opinion, concurred in by Justices Holmes and Brandeis, which can fairly be said to have evolved into the present-day majority view. There Mr. Justice Stone observed:

> The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation . . . . Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the state by the decisions of this Court.
>
> * * * * * *
>
> But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead

to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines. *Id.* at 44.

For these reasons, the Act does not do violence to the Commerce Clause, and represents a permissible exercise of Maryland's police power.

C.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IS CLEARLY CORRECT AND NO CONFLICT EXISTS BETWEEN PARAGRAPH (D) OF THE MARYLAND ACT AND THE ROBINSON-PATMAN ACT.

Four of the appellants contend that Paragraph (D) of the Maryland Act is in conflict with the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970), and is therefore void under the Supremacy Clause of the United States Constitution, (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 13-21; Shell Jurisdictional Statement, No. 77-11, at 8-26; Gulf Jurisdictional Statement, No. 77-47, at 20-24). These appellants collectively argue that Paragraph (D) is in conflict with the so-called "meeting competition defense" contained in Section 2(b) of the Robinson-Patman Act and federal decisions interpreting it, and thus stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting that section. Additionally, one appellant argues that Paragraph (D) would expose it to liability under Section 2(a) of the Robinson-Patman Act for primary-level injury. (Shell Jurisdictional Statement, No. 77-11, at 18-21). As demonstrated below, these several arguments are so lacking in substance as to be without merit and, under the prior decisions of this Court, clearly present no federal question which warrants plenary review.

1. No conflict exists between Paragraph (D) of the Maryland Act and Section 2(b) of the Robinson-Patman Act.

Because appellants present this issue in several ways,[15] appellees believe that the Court may be assisted by a somewhat simpler, collective statement of the appellants' contention on the Robinson-Patman issue.[16] As argued to the court below,[17] and now to this Court, appellants contend that Section 2(b) of the Robinson-Patman Act permits an oil company supplier to discriminate in price among its branded dealer customers who face competitive pressure as a result of lower prices granted by a competing supplier to the competing supplier's branded dealer customers. (Shell Jurisdictional Statement, No. 77-11, at 8; Exxon and Phillips Jurisdictional Statement, No. 77-10, at 14; Gulf Jurisdic-

[15] Exxon and Phillips Jurisdictional Statement, No. 77-10, at 4; Shell Jurisdictional Statement, No. 77-11, at 4-5; Gulf Jurisdictional Statement, No. 77-47, at 3.

[16] Two appellants have misstated the factual premises for the Robinson-Patman issue and, thus, seek to raise contentions not in issue here. They have asserted that voluntary "allowances are restricted to the dealers who are offered price reductions *from other suppliers*. . . ." (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 8 (emphasis added)). There is no factual basis in the record for this proposition. Appellees do not contest, and the court below did not rule, that Paragraph (D) of the Maryland Act would in any way preclude an oil company seller from discriminatorily lowering its prices in good faith to meet an equally low price offered to the *same dealer customer* by another supplier. Paragraph (D) clearly does not apply to that situation.

[17] Appellants' position regarding the Congressional purposes and effects of the "meeting competition defense" contained in Section 2(b) of the Robinson-Patman Act was that "a supplier has a right to grant a competitive allowance among customers to whom a lower competitive offer has been made *or who otherwise face competitive pressures as a result of lower prices granted by a competing supplier to its dealer customers*." The reference is to the brief filed jointly by appellants here in the Court of Appeals of Maryland at 41. (Emphasis added).

tional Statement, No. 77-47, at 21). Appellants' contention, freely translated, stands for the proposition that Section 2(b) of the Robinson-Patman Act permits a seller to discriminate in price among its captive customers in order to enable those customers to meet *their* competition. Appellees submit that such an interpretation is completely unsupported by the clear and unequivocal legislative history of Section 2(b) of the Robinson-Patman Act, totally beyond the specific Congressional purposes and objectives of that proviso, and contrary to the two major decisions of this Court interpreting that legislative history. *Standard Oil Co. v. FTC,* 340 U.S. 231, 242, 249-50 (1951); *FTC v. Sun Oil Company,* 371 U.S. 505, 515-17 (1963). *See, also,* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). These decisions are not easily upset because, as this Court noted recently in *Illinois Brick Company v. Illinois,* 97 S. Ct. 2061, 2070 (1977), "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

In construing Paragraph (D) so as not to impinge upon the Section 2(b) defense, the court below proceeded, as did this Court in *FTC v. A.E. Staley Mfg. Co.,* 324 U.S. 746 (1945), and *Standard Oil Co. v. FTC, supra,* "upon the assumption . . . that if a competitor's 'lower price' is a lawful individual price *offered to any of the seller's customers,* then the seller is protected, under § 2(b). . . ." 340 U.S. at 244 (emphasis added). By confining Paragraph (D) to conform to this assumption, the court below left completely intact a seller's Section 2(b) right "to retain a customer by realistically meeting in good faith the price offered to *that* customer, without necessarily changing the seller's price to its other customers." 340 U.S. at 250 (emphasis added).

The central core of this assumption is, of course, that the seller and his competitor sell to or solicit the same customer. Through this assumption of a "shared customer," emphasis is placed upon "individual competitive situations, rather than upon a *general system of competition.*" *FTC v. Staley Mfg. Co.,* 324 U.S. at 753 (emphasis added). Simply stated, if the existence of a "shared customer" to which a lower price has been offered by a competitor is not a necessary element of the Section 2(b) defense then, with the sole exception of proscribing the discriminatory undercutting of competition, Section 2(b) did not narrow the earlier "meeting competition defense" contained in former Section 2 of the Clayton Act. 38 Stat. 730. Such a conclusion, however, would be totally contrary to the prior decisions of the Court in interpreting the Congressional purposes and objectives in enacting Section 2(b). *See, Standard Oil,* 340 U.S. at 242; *Sun Oil,* 371 U.S. at 515-17.

In *FTC v. Sun Oil Company,* 371 U.S. 505 (1963), the Court was presented by Respondent Sun with a theory that the requirement of having a "shared customer," so that there would be a price which could be met, was satisfied by looking beyond the oil company's immediate customers (the independent dealers) to the ultimate customers (the consumers). This "conduit theory," conjured up to accomodate the exclusive dealing practices of major oil companies, would have created the legal fiction that the consumer, rather than the dealer, is the "shared customer." The Court expressly rejected the "conduit theory" because it was designed to overlook the existence of those persons the Robinson-Patman Act was enacted to protect, specifically, the small, independent businessman. 371 U.S. at 524-25. Although the Court noted that it was not required to pass upon the FTC's assertion that a lower price offered to Sun's dealer by Sun's purported

competitor "was a prerequisite to Sun's invocation of the § 2(b) defense," 371 U.S. at 529 n.19, nothing contained in the rationale of the Court's opinion would imply that the basic "shared customer" assumption of *Staley* and *Standard Oil* might be eliminated to accommodate the oil industry.

Appellants' argument that the decision below conflicts with a substantial body of federal authority is far from compelling. A careful reading of the lower federal court cases cited by appellants in support of this argument shows that they are either inapposite or unpersuasive.[18] Consequently, appellants have attempted to find conflicting federal authority in the form of federal agency reports (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 18-19; Shell Jurisdictional Statement, No. 77-11, at 15-17; and Gulf Jurisdictional Statement, No. 77-47, at 22-23) which, at best, are merely variant "statements of policy." These agency reports are in general conflict with the legislative history of Section 2(b) of the Robinson-Patman Act, and cases of this Court interpreting it. *See,* Note, *Gasoline Marketing and the Robinson-Patman Act,* 82 YALE L.J. 1706 (1973). At a minimum, these ephemeral policy statements are incapable of invalidating the constitutionality of a state statute or rewriting federal legislative history.

[18] With perhaps one exception, Bunty v. Shell Oil Co., [1972] Trade Reg. Rep. (CCH) ¶ 74,252 (D. Nev.), (which is unclear as to whether the holding dealt with the availability of the § 2(b) defense to Shell, or rather the plaintiff's failure to demonstrate a substantial lessening of competition), none of the cases cited by appellants pertains to the issue they seek to raise on this appeal. For example, the *disposition* of the case Bargain Car Wash, Inc. v. Standard Oil (Indiana), 466 F.2d 1163, 1176 (7th Cir. 1972) did not deal with the availability of the § 2(b) defense. The court held that the case was to be remanded for a factual determination of the competitive effects of the oil companies' price support program upon individual dealers without which the court could not intelligently reach the § 2(b) question. The 7th Circuit's comments pertaining to § 2(b) are, therefore, dicta, not holding. *See, also,* Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied,* 408 U.S. 928 (1972) (plaintiff's Robinson-Patman claim was dismissed for failure to meet the "in-commerce" requirement); Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) (involved alleged horizontal and vertical price fixing and illegal tying; comments on § 2(b) are clearly dicta); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) (appeal related solely to lower court's ruling on motions to quash subpoenas *duces tecum* pertaining to discovery from non-party witnesses).

2. Compliance with Paragraph (D) of the Maryland Act does not expose appellants to liability for primary-level injury under Section 2(a) of the Robinson-Patman Act.

Appellant Shell raises a secondary proposition, specifically, that compliance with Paragraph (D) of the Maryland Act will subject it to liability for primary-level injury under Section 2(a) of the Robinson-Patman Act. (Shell Jurisdictional Statement, No. 77-11, at 18-21). Shell ignores the fact that a basic prerequisite to the existence of primary-level injury is the opportunity of the price discriminating seller to make sales to an existing customer of the seller claiming injury.[19] *Bolick-Gillman Company v. Continental Baking Company,*

[19] Shell's reliance on FTC v. Anheuser-Busch, Inc., 363 U.S. 563 (1960) is misplaced. In *Anheuser-Busch,* the defendant was competing with other beer manufacturers for the business of the same customers, *i.e.,* wholesale beer distributors in the St. Louis market. As Shell correctly states, the Court ruled that the absence of secondary-level injury (between the wholesale beer distributors) did not preclude a primary-level injury case under § 2(a) if the requisite injury to primary-level competition resulted. What Shell mistakes is that the primary-level injury which could have resulted in *Anheuser-Busch, i.e.,* a competitor manufacturer's loss of sales to a wholesale beer distributor who was purchasing instead from the price discriminating defendant, *cannot* occur where the price discriminating manufacturer, as in this case, has no competitors for sales to his immediate customers.

278 F.2d 649 (9th Cir. 1960). Paragraph (D) only applies to "voluntary allowances" which, as construed by the Maryland Court of Appeals (App. A, 35a, 40a), involve sales by a supplier to its dealer customers which do not give rise to the factual situation necessary for a finding of Section 2(a) liability, *i.e.* the opportunity of the price discriminating seller to make sales to or solicit an existing customer of the seller claiming injury.[20] In short, Paragraph (D) does not regulate the situation where a price reduction is offered by a supplier to its dealer customer to meet the equally low price offered to that same dealer customer by a competing supplier. (App. A, 40a).

For the purposes of a primary-level violation of Section 2(a), the appellants simply are not "competitors" for the sales regulated by Paragraph (D) unless the Court now adopts the conduit theory which it specifically rejected in *FTC v. Sun Oil Co.*, 371 U.S. at 524-25. It is axiomatic that the "shared customer" necessary to invoke the Section 2(b) defense is also necessary to establish Section 2(a) primary-level liability. The granting of a "voluntary allowance" within the meaning of Paragraph (D) cannot result in primary-level injury because the branded retail service station dealer customer is an independent businessman who sets his own retail price. As there can be no guarantee that the dealer will pass on his "voluntary allowance" to the consumer in the form of a lower price, lost sales by a *different* supplier to its branded dealer customers cannot be assumed. Only if such a guarantee were imposed as a prerequisite to the granting of a voluntary allowance by a supplier to his dealer (*i.e.*, that the dealer pass on the price reduction) might the causal

[20] Competition by suppliers for sales to the *same* dealer customers was not even suggested in the proceedings below. (App. A, 40a).

nexus for a primary-level injury exist.[21] Such an eventuality is, however, resale price fixing. *Bolick-Gillman,* 278 F.2d at 159; *Sun Oil,* 371 U.S. at 524 n.14.

In summary, the Court of Appeals of Maryland was clearly correct in concluding that Paragraph (D) neither impinged upon the Section 2(b) defense nor exposed the appellants to Section 2(a) liability for primary-level injury.

[21] Four appellants concede that it would be illegal to seek to control in any way their respective dealer customers' retail prices. (Exxon and Phillips Jurisdictional Statement, No. 77-10, at 9; Continental Oil Company, et al. Jurisdictional Statement, No. 77-12, at 9). Consequently, as no control whatsoever is exercised by the suppliers over the pricing policies and decisions of their respective dealer customers, any "competitive pressure" at the dealer customer level resulting from lower retail prices can be attributed only to the independent pricing decisions of the dealer customers. For the purposes of the Robinson-Patman Act the supplier and his dealer customer are two different, non-competing sellers (the supplier selling at wholesale, and the dealer customer selling at retail) and the ultimate, unilateral decision of the dealer customer concerning his retail price (and any injury to competition caused thereby) simply *cannot* be attributed to his supplier. *See,* Purolator Products, Inc. v. FTC, 352 F.2d 874, 883 (7th Cir.), *cert. denied,* 382 U.S. 923 (1965); Hiram Walker, Inc. v, A.&S. Tropical, Inc., 407 F.2d 4, 6-8 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the Court of Appeals of Maryland affirmed.

Respectfully submitted,

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